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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

GENERAL MOTORS CORPORATION,
Petitioner,

v.

ROGER W. TRACY, TAX COMMISSIONER OF OHIO,
Respondent.

On Writ of Certiorari to the
Supreme Court of Ohio

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Does the dormant Commerce Clause or the Equal Protection Clause compel States to tax purchases from natural gas public utilities and natural gas marketers in the same way, where the former undertake a heavily-regulated public service obligation to sell and deliver gas on demand while the latter do not?

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STATEMENT

This case involves the constitutionality of a 62 year old tax exemption that applies to purchases of natural gas from regulated public utilities but not to purchases of natural gas from unregulated marketers. In making this classification, Ohio has drawn on a deep tradition of federal and state law respecting the unique public services performed by State utilities and the unique regulatory status given to them. In order to put Ohio's reliance on this classification in context, it is important briefly to describe the nature of the natural gas market, the evolution of federal and state regulations in this area, and the origin of this tax exemption.

A. The Natural Gas Market.

From beginning to end, there are four essential tasks performed by participants in the natural gas market: (1) extracting the gas, (2) physically transporting it through pipelines, (3) brokering sales of the gas, and (4) consuming it. Extraction is performed almost exclusively by producers of natural gas. They locate, drill for, and ultimately withdraw gas from underground reservoirs located throughout the country, including Ohio. They then prepare the gas for transportation.

Transportation of the gas has long been performed by two different participants in the market -- local natural gas utilities (otherwise known as "local distribution companies" or "LDCs") and interstate pipeline companies. The federally-regulated interstate pipeline companies transport the gas between the States, while the State-regulated utilities transport the gas within each State. Both companies own or control their respective transportation equipment.

Brokering sales of natural gas has long been performed by various participants in the market. Whether it be producers, interstate pipeline companies, public utilities

or independent marketers, they have all had authority to broker sales of natural gas. What has changed over time, as shown below, is the ability of each market participant to sell gas and the accessibility of the end user to each seller. Finally, consumption of natural gas is divided into residential and industrial use. Residential end users buy natural gas primarily to heat their homes, while industrial end users buy the gas primarily for manufacturing purposes. J.A. 74.

B. Federal Regulation of the Natural Gas Market.

Congress has not been inactive in regulating the natural gas market under its Commerce Clause powers. For nearly sixty years, it has exercised broad authority in this area, both through federal legislation and through the rulemaking powers of the agency responsible for natural gas, now known as the Federal Energy Regulatory Commission ("FERC"). The one constant in these federal regulations has been a hands-off policy with respect to State regulation of "intrastate" distribution of natural gas. *See* 15 U.S.C. § 717(c).

In 1938, Congress enacted the Natural Gas Act, 15 U.S.C. § 717, *et seq.*, which established a regulatory dichotomy between interstate and intrastate distribution of natural gas. The legislation thus regulated the transmission of natural gas through interstate pipeline companies, and allowed the newly-created federal commission to set rates for sales by these companies. 15 U.S.C. § 717(d). At the same time, the law gave the States authority to regulate intrastate distribution of natural gas through their public utilities.

After passage of the legislation, the structure of the natural gas industry remained straightforward. Producers sold gas in the production area to interstate pipelines at

prices set by the federal commission. The pipelines, in turn, transported the gas to the "city gate" -- the point at which the interstate pipelines met the distribution systems of the local utilities. The utilities then sold the gas directly to industrial and residential consumers at rates set by their public utility commissions. Under this regulatory regime, neither producers nor independent marketers sold gas directly to utilities or end-users.

In 1953, Congress amended the Natural Gas Act to resolve a problem of overlapping state and federal regulation caused by the Court's decision in *Federal Power Comm'n v. East Ohio Gas*, 338 U.S. 464 (1950). In *East Ohio Gas,* the Court allowed the federal commission to regulate intrastate distribution of natural gas by local utilities. *Id.* at 472. In direct response, Congress "eliminate[d] this duplication by leaving the jurisdiction over these companies [*i.e.*, public utilities] exclusively in the States, as always has been intended." H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101, 2102. After the 1953 amendments, responsibility for regulating natural gas utilities once again lay with the States and their public utility commissions. 15 U.S.C. § 717(c) (granting the States "jurisdiction" over "natural gas received . . . within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State").

In 1978, Congress took an initial step toward lowering competitive barriers in the interstate natural gas markets by enacting the Natural Gas Policy Act. *See* 15 U.S.C. § 3391, *et seq*. For the first time, the law gave utilities and industrial end-users limited ability to purchase gas directly from producers and to transport the gas through interstate pipelines. *Id.*

In 1985, FERC continued to deregulate this aspect of

the market. It established a rule of open access to interstate pipelines, which permitted public utilities and industrial end-users to buy gas directly from producers and marketers in the production area, and then to ship that gas via interstate pipelines. *See* Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (1985) (to be codified at 18 C.F.R. § 2), *Associated Gas Distribs. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

In 1992, FERC took the policy of open access to interstate pipelines a step further. It required all pipelines to "unbundle" their transportation services from their commodity-sales services. This meant that marketers, public utilities and industrial consumers could buy natural gas directly from the purchaser and then arrange separately to pay for the interstate and intrastate transportation of the commodity. *See* Order No. 636, Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 57 Fed. Reg. 13,267, 13,269 (1992) (to be codified at 18 C.F.R. § 284).

Through each of these changes in federal law, Congress continued to delegate primary authority to the States for regulating intrastate distribution of natural gas.

C. State Regulation of the Natural Gas Market.

1. State Law Prior to Federal Deregulation.

Prior to the wave of federal deregulation that hit the natural gas industry between 1978 and 1992, Ohio regulated participants in the market in one of two general ways.

Natural gas utilities lived under a distinct regulatory regime, while all other participants in the natural gas market were simply regulated like other Ohio businesses.

Ohio has long imposed unique regulatory burdens on natural gas utilities, as well as other utilities, in view of the important public service they perform and the distribution monopoly that they possess. For example, natural gas utilities:

* Must serve all members of the public and must ensure access to natural gas for residential and industrial consumers alike, R.C. § 4905.03; R.C. § 4905.06;

* Must guarantee a supply of natural gas for all consumers at all times, and thus must enter into costly long-term purchase and storage contracts, R.C. § 4905.22;

* May not set their own rates and are prohibited from selling natural gas above cost, R.C. § 4905.302;

* May not terminate service for non-payment in the winter, R.C. §§ 4933.12, 4933.122; and

* Must meet complex reporting requirements and may not issue

> securities or enter into contracts without the permission of the Ohio public utility commission, R.C. §§ 4905.14, 4905.40, 4905.41, 4905.48, 4935.04.

In return for these unique regulatory burdens and for the special public service that utilities provide, public utilities receive unique regulatory benefits. For example, utilities:

* Have powers of eminent domain, R.C. § 1723.01-.03; and

* Are assured a reasonable return on their capital equipment, R.C. § 4909.15.

Nor has Ohio historically limited the unique regulation of public utilities to rates, access, eminent domain powers and the like. The State has long treated public utilities differently from other businesses for purposes of taxation. Utilities pay essentially three types of taxes: (1) a personal property tax on 88% of the true value of their property, R.C. § 5727.111; (2) a special tax assessment for the expenses of the Public Utility Commission of Ohio, R.C. § 4905.10, and for the expenses of the Ohio Consumer Counsel, R.C. § 4911.18; and (3) a gross receipts tax of 4.75% on their accumulated sales. In contrast, other Ohio businesses generally pay the following taxes: (1) a personal property tax on 25% of the value of their property, R.C. § 5711.22; and (2) a franchise tax, R.C. § 5733.01, *et seq.*

2. State Law After Federal Deregulation.

Continuity and change marked Ohio's regulation of distributors of natural gas after federal deregulation. On the one hand, public utilities saw virtually no change in their regulation. They continued to face the same oversight, pay the same types of taxes, and live under the same restrictions on pricing and delivering natural gas. On the other hand, federal deregulation gave rise to a new industry of independent marketers who could make direct sales to Ohio consumers but were not subjected to this regulatory regime. Though in-state and out-of-state marketers do business in Ohio, they are regulated the same without regard to their location. Ohio ultimately decided to regulate marketers in the same way it generally regulates other businesses that sell tangible personal property in the State.

In the aftermath of federal deregulation, Ohio now has two very different sets of rules governing the entities responsible for making final sales of natural gas to Ohio consumers:

Public Utilities	Marketers
Sales price set by regulators.	Sales price set by market.
Must sell to all consumers.	Can sell to whomever they please.
Operate pipelines.	Do not operate pipelines.
Limited ability to terminate for non-payment.	May terminate whenever contract permits.

Public Utilities	Marketers
May correct for underbilling for restricted reasons.	May correct for underbilling at any time.
Face heavy utility disclosure requirements.	Face no utility disclosure requirements.
Must treat customers equally on an average cost basis.	May negotiate different deals with different customers.
Need approval from PUCO to issue securities, issue bonds or enter into a contract.	No such approval needed.
Must submit long-term forecasts to PUCO detailing future demand and supply of gas.	No such reporting requirements.
Pay personal property tax on 88% of true value.	Pay personal property tax on 25% of true value.
Pay a tax assessment for PUCO expenses.	Exempt from PUCO assessment.
Pay gross receipts tax of 4.75%.	Pay franchise tax.

3. The Ohio Sales and Use Tax Exemption.

In 1934, the Ohio legislature enacted the tax

exemption now under attack. Included in the same bill that established Ohio's first sales tax on tangible personal property, the provision exempted from taxation all purchases from public utilities. 1934 Laws of Ohio 115 Pt. II 306, 308.

In its current (essentially unchanged) form, the statute exempts the following purchases from the sales tax:

> Sales of natural gas by a natural gas company, of electricity by an electric company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through wires, pipes, or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code.

R.C. § 5739.02(B)(7). To be a "natural gas company," one must be

> engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state.

R.C. § 5727.01(D)(4). A similar definition of "natural gas company" applies to the statutes governing Ohio's public utility commission. *See* R.C. § 4905.03(A)(6) (companies "engaged in the business of supplying natural gas for lighting, power, or heating purposes to consumers within this state").[1]

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[1] Ohio also imposes a complementary tax on the use of tangible personal property in Ohio. R.C. § 5741.02. The use tax does not apply to purchases that, "if made in Ohio, would be a

From its inception, this exemption was designed to account for another tax already paid by public utilities. Because utilities were subject to the gross receipts tax, 101 Ohio Law 399, 412-13 (1910), the legislature determined that there was no need to impose a separate 5% sales tax on each individual purchase of the commodity. "[T]he whole legislative course," the Ohio Supreme Court has recognized, "shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities that are subject to the excise tax under [R.C. § 5727.30 and .31]." *Haefner v. City of Youngstown*, 68 N.E.2d 64, 67 (1946).

The tax exemption, however, does not apply to natural gas sales by unregulated marketers, who likewise do not pay Ohio's 4.75% gross receipts tax. In construing the statute, the Ohio Supreme Court has determined that marketers are not natural gas utilities because they do not "own or operate the transportation and distribution equipment and deliver the natural gas to consumers in Ohio." G.M. Petition for Certiorari Appendix ("Pet. App.") 3a. *See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995).

D. Impact of Deregulation and the Tax Exemption on the Ohio Natural Gas Market.

While deregulation of natural gas sales has had a significant impact on the Ohio market, the record contains no indication that the tax exemption has impacted the free flow of natural gas in Ohio or elsewhere. Over the last decade and a half, the principal change has been a segregation of the industrial and residential markets. Independent marketers now control roughly 90% of the industrial market, while

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sale not subject" to the sales tax. R.C. § 5741.02(C)(2).

utilities continue to dominate the residential market. *See* J.A. 194; *In re FERC Order 636*, No. 93-1636-GA-UNC (PUCO Entry at 7) (Dec. 1, 1994). Thus, even though deregulation facilitated marketers' efforts to sell directly to residential customers, they have not done so. The apparent reason for this development has nothing to with the sales and use tax exemption, and everything to do with the Ohio requirement that all suppliers of natural gas to "human needs customers" provide a firm backup supply of gas. *Id.* "Human needs customers" include all residential consumers as well as hospitals, college dormitories and other uses involving principal living quarters. *Id.* at Appendix A, 9-10. In-state or out-of-state marketers willing to undertake the obligation to provide a firm backup supply of gas and the other duties of a public utility could qualify as Ohio utilities and thus obtain the benefits of the tax exemption.

E. The Natural Gas Transactions in Dispute.

The natural gas transactions at issue arose during the audit period January 1, 1987 through December 31, 1989, Pet. App. 7a. Each of the disputed transactions involves purchases from independent marketers, Pet. App. 1a, and concerns purchases both from Ohio-based and out-of-state marketers. *Id.;* J.A. 16-57 (Ex. 10-A), 142, 148-50, 192 (Ex. 9A-15H). In each instance, General Motors' purchase contracts provided that the contract would become void if the marketer became subject to regulation as a public utility. *See, e.g.*, J.A. 37-38.

F. The Ohio Supreme Court's Decision.

General Motors presented two issues to the Ohio Supreme Court. It first made a statutory construction argument, contending that it was entitled to the tax exemption because independent marketers constituted natural

gas public utilities for tax purposes. Pet. App. 2a. Not so, the Court held: "[A] vendor in the type of sales now before us" is not a natural gas public utility under either the language of the statute or the public utility commission's interpretation of it. *Id. See also Chrysler Corp. v. Tracy*, 652 N.E.2d 185, 187 (Ohio 1995).

General Motors then argued that denying the exemption to marketers violated the Commerce and Equal Protection Clauses. *Id.* In making this argument, General Motors relied on several different factual allegations, including the following: (1) that the tax "is imposed only on goods originating outside the State," Jt. App. 262; (2) that "[t]here is no sales tax on in-state purchases of natural gas, but gas purchased out-of-State and brought into Ohio is subject to use tax," Jt. App. 262; (3) and that "GM has to purchase the gas *in Ohio* to qualify for the exemption," Jt. App. 259.

Each of these factual premises, however, was incorrect. No distinctions are made between in-state and out-of-state natural gas. And natural gas marketers and utilities engage in different businesses that warrant different treatment. The Court thus rejected General Motors' constitutional arguments, and ultimately concluded that "the commissioner does not favor in-state purchases over out-of-state purchases." Pet. App. 4a.

SUMMARY OF ARGUMENT

General Motors' dormant Commerce Clause argument contains several flaws. First, the Ohio legislature plainly did not intend to discriminate against interstate commerce when it enacted this exemption for public utilities from its sales tax in 1934. The supposed objects of discrimination (in-state and out-of-state marketers) did not even exist at that time and did

not begin selling natural gas to Ohioans until the early 1980's.

Second, the unintended consequences of the statute do not rise to the level of facial discrimination against interstate commerce. The written words do not contain an "explicit discriminatory design," *Amerada Hess Corp. v. Director, Div. Of Taxation*, 490 U.S. 66, 76 (1989), or favor an in-state entity over a "similarly situated" out-of-state counterpart, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987). The statutory language contains none of the hallmarks of interstate commerce discrimination: (1) the exemption is generally applicable and benefits all public utilities, not just natural gas utilities; (2) the exemption makes no classifications based on the origin of the natural gas; (3) the statute does not make it more difficult for companies headquartered out of state to become members of one or the other regulated class; and (4) the statute treats in-state and out-of-state marketers entirely the same.

Nor does Ohio's extension of the exemption to natural gas utilities, but not to unregulated marketers, alter this conclusion. Utilities undertake an obligation to serve all members of the public on demand, sell at regulated rates, and sell both a commodity (natural gas) and a service (delivery of the gas). Marketers, by contrast, undertake no statutory obligation to serve the public on demand, sell at whatever price the market will bear, and sell just a commodity (natural gas). The former is not a relevant counterpart of the latter, making it entirely permissible for Ohio to classify them differently for tax purposes.

A similar flaw plagues General Motors' allegation that Ohio denies the tax exemption to purchasers from out-of-state utilities and therefore discriminates against foreign utilities. One group simply is not like the other. When an out-of-state

utility sells to an Ohio consumer, it incurs none of the regulatory burdens of being a public utility in making that sale (*e.g.*, rate control or delivery obligations), and thus properly shares in none of the benefits Ohio extends such companies. At all events, the allegation is entirely speculative. General Motors did not purchase gas from out-of-state utilities in this instance, has not established that Ohio would deny the exemption under those circumstances, and has overlooked at least one Ohio case suggesting that General Motors' speculation is incorrect. Because the Court has "never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands," *Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1824 (1994), this argument must be rejected.

Third, General Motors has not argued, much less shown, any disproportionate burden on interstate commerce caused by Ohio's adherence to this traditional regulatory classification. Far from burdening marketers, in fact, it appears that the Ohio classification has been a blessing. Marketers now dominate the industrial natural gas market in Ohio, and apparently have chosen not to enter the residential market only because of the additional requirements they must meet to make such sales.

But even if impermissible discrimination existed, the statute should still be sustained because Congress has not been silent in this area and has explicitly endorsed the very classification Ohio has drawn. From 1938 to the present, Congress has clearly delegated exclusive "jurisdiction" to the States to regulate intrastate distribution of natural gas. 15 U.S.C. § 717(c). *See Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408

(1946).

No less flawed is General Motors' equal protection claim. Because natural gas utilities and marketers engage in fundamentally different businesses, sell fundamentally different products -- one sells a naked commodity, the other sells a commodity plus the delivery service -- and have fundamentally different obligations to the public, Ohio acted rationally in regulating and taxing them differently.

ARGUMENT

I. OHIO'S REGULATION OF NATURAL GAS PUBLIC UTILITIES AND MARKETERS DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

By its terms, the Commerce Clause is a grant of congressional authority. It provides that "Congress shall have Power . . . [t]o regulate Commerce . . . among the several States." U.S. Const., art. I, § 8, cl. 3. Over time the Court has interpreted the Clause to contain a negative component as well -- to mean that, even when Congress does not exercise its plenary authority over interstate commerce, the Clause nonetheless restricts state regulations that interfere with interstate commerce.

Such "dormant" commerce clause challenges to state tax regulations, the Court has held, are assessed under a four-part test: (1) does the regulation apply to an activity with a substantial nexus to the regulating state; (2) is the regulation fairly apportioned; (3) does the regulation discriminate against interstate commerce; and (4) is the regulation fairly related to services provided by the state? *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287

(1977).

In this instance, General Motors does not dispute three aspects of the *Complete Auto* test. It thus agrees that the tax has a "substantial nexus" to Ohio, is "fairly apportioned," and is "fairly related" to services provided by the State. General Motors instead argues solely under the third prong of the *Complete Auto* test -- that the tax discriminates against commerce. The automotive giant is wrong in doing so.

A. This 62 Year Old Tax Exemption Does Not Impermissibly Discriminate Against Interstate Commerce.

No cognizable theory under the dormant Commerce Clause prevents Ohio from enforcing this venerable tax exemption. The exemption does not have a discriminatory purpose; it does not facially discriminate between similarly situated in-state and out-of-state businesses; and it does not disproportionately burden interstate commerce. *See Amerada Hess*, 490 U.S. at 75-76.

1. Ohio Plainly Did Not Intend to Discriminate Against Interstate Commerce When It Passed This Tax Exemption in 1934.

The sales tax exemption under attack is not new. It was enacted in 1934 as part of the same bill that established Ohio's first sales tax. 1934 Laws of Ohio, 115 Pt. II, 306, 307-08 (1934). The initial legislation thus created a generally applicable sales tax and a generally applicable exemption for all purchases from public utilities of natural gas, water, electricity, and other utility services. *Id*. The twin purpose of the exemption was to account for the gross

receipts tax that public utilities already paid on accumulated sales of their services, and to avoid imposing a sales tax on each individual purchase which would at best be redundant and at worst a form of double taxation. *See Haefner v. City of Youngstown*, 68 N.E.2d 64, 67 (1946) ("the whole legislative course shows an intent to avoid double taxation of receipts whether they come from sales proper or are the 'gross receipts' of utilities"); *id.* ("the exemptions . . . are in keeping with a legislative policy of excepting from the sales tax proper sales already taxed in the same or a similar way"). The substance of the exemption has not changed during the 62 years since it was enacted.

Under these circumstances, the exemption plainly was not designed to discriminate against interstate commerce. It was enacted long before the supposed objects of discrimination (independent marketers) came into existence, and thus long before the Ohio legislature could even conceive a discriminatory motive. At the time the tax exemption was enacted, all natural gas was sold through public utilities and thus all natural gas sales were exempt from sales and use tax. Only the broadest conception of an "ingenious" discriminatory motive, *see Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940), could condemn legislation in this situation. The law, in short, does not have a discriminatory motive, as General Motors seems to concede. G.M. Br. 17 n.14.

2. The Tax Exemption Does Not Facially Discriminate Against Interstate Commerce.

Nor do the unintended consequences of the exemption rise to the level of facial discrimination. In attempting to meet its "burden" of showing such discrimination, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979), and of invoking the

"virtually *per se*" rule of unconstitutionality, *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S.Ct. 1345, 1347 (1994); *see* G.M. Br. 17, General Motors understandably does not proceed on the theory that the statute as enacted in 1934 discriminated on its face. Instead, General Motors argues that the discrimination arose as a matter of historical accident. Once marketers were able to sell natural gas directly to Ohio consumers, the argument goes, facial discrimination sprang into existence when Ohio did not immediately extend the exemption to unregulated marketers. This truly dormant theory of interstate commerce discrimination, however, does not accord with precedent, fact or common sense.

Two fundamental principles allow Ohio to weather this claim. In the first place, the rule of "virtually *per se*" invalidity is not implicated when "there is no explicit discriminatory design" in the words of the statute. *Amerada Hess*, 490 U.S. at 76. In the second place, facial discrimination does not exist unless the State law "imposes a greater burden on out-of-state [companies] than it does on *similarly situated* [in-state companies]." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) (emphasis added). There thus is "no 'iron rule of equality' between taxes laid by a State on different types of business." *Alaska v. Arctic Maid*, 366 U.S. 199, 205 (1961) (citation omitted) (allowing differential treatment of fish processed by freezer ships and fish processed by local canneries). *See also Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1825 n.5 (1994) (requiring comparison between "substantially equivalent events" in order to "avoid[] being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system") (internal quotation omitted); *Kraft General Foods v. Iowa Dept. of Revenue and Finance*, 505 U.S. 71, 80-81 (1992) (requiring

comparison between companies who are "most similarly situated") (citation omitted); *Dumbar-Stanley Studios v. Alabama*, 393 U.S. 537 (1969) (allowing differential tax treatment of traveling photographers and photographers operating out of fixed locations).

Illustrating these principles are *Amerada Hess*, 490 U.S. 66 (1989) and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). In *Amerada Hess*, the Court held that New Jersey's differential tax treatment of oil producers and retailers, which were both engaged in direct sales of oil, was not facially discriminatory. "Whatever different effect the [challenged regulation] may have on these two categories of companies," the Court held, "results solely from differences between the nature of their businesses, not from the location of their activities." 490 U.S. at 78. And that was true even though the tax benefit at issue was denied to a group of companies -- oil producers that market their oil -- located exclusively out of state. *Id.* at 77-78.

Exxon is to the same effect. At issue was a Maryland statute that prohibited oil producers or refiners from operating retail service stations in the State and that required them to extend price reductions uniformly to all retail stations they supplied. Even though the burden of the statute fell solely on out-of-state producers and refiners and even though the statute benefitted in-state independent retailers, the Court found no discrimination. The statute, the Court held, had "no demonstrable effect whatsoever on the interstate flow of goods" -- and thus no discriminatory effect on interstate commerce -- because, as here, "[t]he sales by independent retailers are just as much a part of the flow of interstate commerce as the sales made by the refiner-operated stations." *Exxon*, 437 U.S. at 126 n.16.

Much like the above cases, General Motors cannot

establish "explicit" facial discrimination or discrimination between "similarly situated" companies and "substantially equivalent" sales.

a. No "Explicit Discrimination" Appears on the Face of the Statute.

General applicability of exemption. On its face, the statute bears none of the hallmarks of facial discrimination. The law grants a generally-applicable exemption, and extends the benefit not just to natural gas public utilities but to all public utilities -- whether they provide telephone services, electricity, water or in this instance natural gas. That in itself ought to be enough to show that the "explicit" design of the law is to treat a uniquely regulated class of businesses as one, just like other tax and regulatory provisions of the Ohio Revised Code. Nothing about the language of such a statute, or the general division between regulations for public utilities and other businesses, shows discrimination against a discrete group of out-of-state brokers of natural gas.

No discrimination based on origin of goods. The statute likewise does not draw any distinctions based on where the natural gas originated. Natural gas produced in Texas is as apt to obtain the exemption as gas produced in Ohio. What matters is who retails the commodity -- a company that chooses to own and operate distribution equipment and therefore become regulated as a public utility or a company that does not and therefore remains an unregulated marketer. Under these circumstances, whether commerce in gas is interstate or intrastate is irrelevant under Ohio tax law. The salient distinction is between public utilities and marketers. The Court is "not, therefore, confronted here with the type of differential tax treatment of interstate and intrastate commerce that the Court has found in other 'discrimination' cases." *Commonwealth Edison v.*

Montana, 453 U.S. 609, 618 (1981).[2]

No geographic barriers to becoming a public utility or marketer. The statute also does not make it more difficult for companies headquartered out-of-state to become members of one or the other regulated class. No geographic lines or preferences are drawn. In point of fact, the question whether to live under one set of rules or another has nothing to do with geography or local favoritism. It initially has to do with whether the business wishes to sell just one thing (a naked sale of natural gas) or two things (a sale of natural gas together with the service of delivering the gas through owner-operated pipelines). And it ultimately has to do with whether the business wishes to live under a regime of heavy

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[2] The absence of any discrimination based on the origin of the natural gas distinguishes this regulation from the laws at issue in virtually all of the facial discrimination cases relied on by General Motors. *See, e.g., West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205 (1994) (Massachusetts subsidy provided to in-state milk producers but not to out-of-state producers); *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994) (Oregon charged higher disposal fee for out-of-state solid waste than in-state solid waste); *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992) (law permitted county landfill operators to refuse to accept solid waste from outside the county); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (Hawaii exemption "applie[d] only to locally produced beverages"); *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (Florida law required local milk processor to purchase milk requirement from producers within a four-county marketing area); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (Madison, Wisconsin ordinance prohibited the sale of pasteurized milk in the city unless it had been pasteurized "within a radius of five miles" from downtown); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (Virginia imposed tax on meat slaughtered 100 miles or more from the place of sale).

regulations or a regime of no regulations.

No geographic preference for in-state marketers. Ohio denies all marketers, whether in-state or out-of-state, the benefits of the exemption, just like it does with respect to most businesses that sell tangible personal property. Thus, a sales tax payment results if General Motors purchases natural gas from an Ohio-based marketer, and a use tax payment results if it purchases natural gas from an out-of-state marketer. *See* R.C. § 5739.02. The only difference is that the legal incidence of tax changes because the consumer pays the one (the use tax) while the seller pays the other (the sales tax). The two taxes, this Court has properly recognized, do not discriminate against interstate commerce. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996).

That Ohio denies the exemption to in-state marketers and to virtually all industrial consumers of natural gas in the State offers one more piece of statutory evidence that the law is non-discriminatory. "The Court generally defers to health and safety regulations because 'their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations.'" *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677, 1689 (1994) (O'Connor, J., concurring) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 444 n.18 (1978)). Indeed, "[t]he existence of major in-state interests adversely affected by the Act is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).[3]

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[3] Not just Ohioans, but citizens of all States, would be unlikely to suffer if the Ohio sales tax exemption were adopted in every State in the country. That, too, undermines General Motors' claim. "[T]he practical effect of [the exemption] must be

In the end, the statute contains none of the telltale signs of facial discrimination -- be it a tariff, an embargo, local "protectionism," "economic Balkanization," or any other explicit favoritism for intrastate over interstate interests. On its face, the law grants a generally-applicable exemption from a generally-applicable tax, and does so on the basis of a distinction (between public utilities and other businesses) that is as wide-spread among the States as it is time-honored. *See* State Amicus Br. 1-4. Such a law simply does not discriminate against interstate commerce.

b. Differential Treatment of Different Businesses and Different Transactions Does Not Constitute Facial Discrimination.

In response, General Motors advances essentially one theory of discrimination. The Ohio regulatory scheme is facially discriminatory, General Motors submits, because the allegedly favored class (public utilities) is defined by control of pipelines in Ohio and distribution of gas through them. The argument is at once creative but at the same time implausible, and in the end fails to show any "explicit discriminatory design." *Amerada Hess*, 490 U.S. at 76. The key flaw is that this "geographic distinction" does not

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evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of the other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Wyoming v. Oklahoma*, 502 U.S. 437, 453-54 (1992) (quoting *Healy v. Beer Institute*, 491 U.S. 324, 336 (1989)). In view of the States' wide-spread tradition of separately regulating intrastate sales and distribution of natural gas, it is too late in the day to argue that a State law respecting that tradition would somehow impair the stream of commerce.

benefit an in-State entity at the expense of similarly situated "counterparts . . . in other States." *Oregon Waste*, 114 S. Ct. at 1350. *See CTS Corp.*, 481 U.S. at 88.

Deregulated marketers are not "similarly situated" "counterparts" of regulated utilities. Each group has separate obligations and lives under exceedingly different regulations. The tax exemption at issue in this case thus plays but a small part in the broad regulatory scheme that has long treated public utilities differently from other businesses -- in matters both of taxation and other regulations. The two entities sell natural gas differently, buy natural gas differently, price natural gas differently, and treat customers differently.

No less than General Motors itself has acknowledged this fundamental distinction through its conduct in this case. The car company entered into contracts that terminated as a matter of law if any of the marketers became regulated as utilities. J.A. 37-38. That fact, better than any legal argument, illustrates the difference in kind between the two entities and General Motors' ultimate design to reap the benefits but not the burdens of utility status.

Utilities are different from marketers in another important respect. They operate as "natural monopolies" and deliver an essential commodity that the public has a statutory right to demand. *See* Peter W. Huber, et al., *Federal Telecommunications Law*, 9.1, at 423-28 (1992). Unlike marketers and other businesses, utilities participate in a distribution system that contains a finite supply of pipeline equipment. Because States understandably wish to have just one set of water pipes, electric wires or pipelines, as the case may be, criss-crossing their territory, they limit the supply of this equipment and heavily regulate its owners. Richard J. Pierce, Jr., *The State of the Transition to Competitive*

Markets in Natural Gas and Electricity, 15 Energy L.J. 323, 328 (1994). Even after federal deregulation, this feature of public utilities will remain. At the same time, utilities also provide a product and distribution service that Ohio citizens have a right to obtain on demand. *See* R.C. § 4905.22 (imposing an "obligation to serve" the public); *Motor Cargo, Inc. v. Board of Township Trustees*, 117 N.E.2d 224, 226 (Summit Co. C.P. 1953) ("[T]he principal determinative characteristic of a public utility is that of service to, or readiness to serve an indefinite public . . . which has a legal right to demand and receive its services or commodities.") Because marketers, by contrast, simply broker sales and do not undertake physical delivery to customers on demand, there is no equivalent reason to regulate them like utilities. They simply do not undertake the yoke of utility status and quite fairly do not share in its benefits.

Nor is Ohio's separate taxation and regulation of utilities a recent innovation. All 50 States and the District of Columbia separately regulate the business of local natural gas distribution. *See* State Amicus Br. 1 n.1. And 31 States have separate taxation structures for public utilities. *Id.* at 2-3 n. 2. Moreover, for nearly as long as the dormant Commerce Clause has been a feature of constitutional law, *see Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), Ohio has regulated utilities differently from other businesses, *Cooper v. Williams*, 4 Ohio (Hammond) 253 (1831).

Fully recognizing the legitimacy of this distinction, Congress itself has given the States broad authority to make this precise regulatory classification. Under 15 U.S.C. § 717(c), States have explicit authority to regulate natural gas utilities. No such federal legislation applies to marketers.

Both before and after the passage of this federal legislation, moreover, this Court has acknowledged the

unique status of public utilities.

> Since carriers and other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relative freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions. Carriers may be treated as a separate class . . . and, as such, taxed differently or additionally.

New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 579 (1938). For similar reasons, the Court recently reaffirmed that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *New Orleans Public Service, Inc. v. City of New Orleans*, 491 U.S. 350, 365 (1989) (citation omitted).

Against this economic, legislative, and historical backdrop, the dormant Commerce Clause does not suddenly compel Ohio to abandon this dichotomy. It does not put Ohio to the all-or-nothing-at-all choice of regulating every retailer in the natural gas market the same, whether they operate distribution equipment or not. Neither does it compel the lesser alternative that General Motors seeks here -- namely, permitting marketers to slice off the benefits of being a public utility but not the burdens. Ohio permissibly requires its companies to take the bitter with the sweet. In the end, marketers and utilities may well distribute the same

commodity. But they clearly are not "similarly situated" "counterparts" of one another when it comes to establishing a case of facial discrimination and harvesting the benefits of the rule of "virtually *per se*" invalidity that allegedly comes with it.

In-state and out-of-state utilities are not similarly situated counterparts. Despite the well-established distinction between utilities and other businesses, General Motors posits that facial discrimination still exists because Ohio does not extend the exemption "to purchases from out-of-state public utilities." G.M. Br. 18. This hypothetical inconsistency, however, does not help the car company.

As an initial matter, the same defect that condemns General Motors' marketer comparison condemns this one. When all is said and done, there simply is no out-of-state analogue to an Ohio utility and thus no similarly situated group to which Ohio could extend this exemption. True, out-of-state utilities operate pipelines. True also, they use pipelines to deliver natural gas and live under heavy regulations in doing so. But that is not to say that these aspects of their business have any relevance to a natural gas transaction with an Ohio consumer. If, for example, an Indiana utility chooses to broker a natural gas sale to an Ohioan, it does so in the capacity of a marketer, not in the capacity of a utility. The Indiana utility merely sells a naked commodity to an Ohio consumer, but relies on others to distribute the gas, relies on other pipelines for doing so, and accordingly is spared the heavy Ohio (and Indiana) regulation that comes with the territory of owning and using distribution equipment in a State.

Ohio has long recognized, moreover, that utilities may operate in a "'dual capacity,'" and thus may be regulated differently in each capacity. *See General Am.*

Transp. Corp. v. Limbach, 473 N.E.2d 814, 817 (Ohio 1984) (subjecting "dual capacity" enterprise to general business regulations when operating as a manufacturer and to utility regulations when operating as a utility). Thus, an out-of-state utility may act as a marketer and thus free itself of State regulatory burdens; or it may act as a utility and take on those burdens. The two transactions are not "substantially equivalent events" and treating them separately is the only way to "avoid[] being drawn into an amorphous inquiry that involves balancing incommensurate burdens imposed on disparate activities throughout the complex structure of a State's tax system." *See also Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815, 1825 n.5 (1994) (citation omitted). In sum, while Ohio presumably has authority to extend this tax exemption to out-of-state utilities, nothing in the Commerce Clause compels it to do so.

General Motors, in any event, cannot rely on its out-of-state utility hypothetical. Perhaps more importantly, Ohio's hypothetical treatment of out-of-state utilities is just that -- a conjured vision of discrimination that has no place in a facial challenge, no support in the record and no foundation in Ohio law. Just three terms ago, the Court reminded taxpayers that "we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." *Associated Indus.*, 114 S. Ct. at 1824. General Motors did not meet any of its natural gas needs through out-of-state utilities in this instance, and thus did not challenge the validity of the statute as applied to that situation. Under these circumstances, the carmaker cannot invoke the specter of discrimination in some other setting in order to make up for the utter lack of discrimination here. *See id.*; *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Roemer v. Board of Public Works*, 426 U.S. 736, 761 (per curiam) (1976) ("It has not been the Court's practice, in considering

facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may [be] unconstitutional.").

That General Motors offers no evidentiary or legal foundation for its argument confirms the wisdom of this rule. Nothing on the face of the statute indicates that Ohio draws a line between in-state and out-of-state utility sales. And nothing obtained during discovery or at the hearing in this case supports the assumption either. It may well be that under some circumstances (or even under all circumstances) Ohio would extend the exemption to out-of-state utilities. Indeed, the one Ohio case to consider this issue suggests that General Motors' assumption is wrong. At issue in *Carnegie Natural Gas Company v. Tax Comm'r*, Case No. 94-K-526, Ohio Bd. Tax App. (reported in Ohio Tax Rep. (CCH) at ¶ 402-254) (Nov. 17, 1995) was whether a Pennsylvania public utility should be regulated as an Ohio utility when selling natural gas to an Ohio consumer. *Id.* at 3-7, 9. The Board of Tax Appeals concluded that the company was an Ohio utility under R.C. § 5727.01, potentially making it eligible for the tax exemption at issue in this case.

The real point, however, is not that Ohio would or would not extend the exemption to an out-of-state utility. It is that General Motors did not purchase from out-of-state utilities in this instance and thus cannot deploy a case of hypothetical discrimination to shore up its claim that the dormant Commerce Clause forbids Ohio from taxing utility and marketer sales differently.

3. Ohio's Regulatory Scheme Does Not Place a Disproportionate Burden on Interstate Commerce.

For many of the same reasons that General Motors cannot establish facial discrimination here, it cannot show that the Ohio regulations place an undue burden on interstate commerce. While the Court has held that a facially neutral statute may impermissibly burden interstate commerce in application, no such showing has been made in this instance. *See Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."); *Amerada Hess*, 490 U.S. at 75.

First, it is not even clear that General Motors is pressing this argument. It did not argue below -- and does not appear to be arguing now -- that Ohio has offended the dormant Commerce Clause on this ground.

Second, even if General Motors purports to be making this argument, it has not established any factual predicate for doing so. *See Associated Indus.*, 114 S.Ct. at 1824 (actual, not "hypothetical," discrimination violates the Commerce Clause); *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537 (1951) ("a taxpayer claiming immunity from a tax has the burden of establishing his exemption"). The record is completely barren of evidence that this particular tax exemption, or Ohio's general segregation of the regulations applicable to utilities and marketers, has caused an undue burden on interstate commerce.

Finally, what evidence there is leads to a contrary

conclusion. Far from impeding commerce, Ohio's overall regulation of marketers and utilities has allowed marketers to corner the market for industrial sales of natural gas. J.A. 194. At the same time, even though marketers have been able to enter the residential market for some time, they have not done so. J.A. 195. The reason, however, has nothing to do with this tax exemption and everything to do with the requirement that sellers in this market need to guarantee a firm back-up supply for meeting the gas needs of individual consumers. *See* Joseph Fagan, *From Regulation to Deregulation: The Diminishing Role of the Small Consumer Within the Natural Gas Industry*, 29 Tulsa L. Rev. 707, 723-27 (1994).

At a more general level, no tenable argument exists that public utilities receive easier treatment than unregulated marketers. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 69 (1963) (Court "must take the whole scheme of taxation into account"); *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481-82 (1932). Consider the stark differences in tax treatment between the two entities. Utilities pay property taxes on 88% of the true value of their taxable property, R.C. § 5727.111, while marketers pay tax based on 25% of the true value of their taxable property, R.C. § 5711.22. Utilities pay a gross receipts tax of 4.75% and cannot deduct ordinary and necessary expenses in doing so, R.C. § 5727.38, while marketers pay a 5-7% sales and use tax, a high percentage of which is deducted under Ohio's direct-use-in-manufacturing exemption, R.C. § 5739.02(B)(15). Utilities are not permitted to charge more than cost on each sale, while marketers are permitted to make an unlimited profit on each sale and thus must pay a franchise tax on profits (if incorporated) or an income tax (if not). R.C. §§ 5733.01, 5747.02. Utilities must pay a tax assessment for the expenses of the PUCO and the Ohio Consumer's Council, while marketers pay no such assessment. R.C.

§ 4905.10; R.C. § 4911.18. As the amicus brief of one of the participants in this market illustrates, a comparison between the effective rate of taxation for the two groups shows that marketers are the favored class. *See* Brief of Columbia Gas of Ohio, 19-23.

The disproportionate tax burden assessed against utilities, moreover, is just the beginning of the regulatory net that ensnares utilities but not marketers. Both the FERC and the PUCO regulate natural gas public utilities, but not marketers. 15 U.S.C. § 717, *et. seq.*; R.C. Title 49. In light of these regulations: (1) utilities cannot terminate service to a customer for non-payment or any other reason, except in extremely limited circumstances, R.C. §§ 4933.12, 4933.122, 4933.123, while marketers may terminate service whenever they see fit subject only to the terms of their contract with each customer; (2) utilities are restricted in their ability to correct for underbilling, while marketers are not, R.C. § 4933.28; (3) utilities' rates and their method of operation are governed by the PUCO during a costly hearing process, while marketers are free to charge whatever the market will bear, R.C. §§ 4909.15, 4905.37; (4) utilities must make public all information pertaining to their operations, contracts and sales efforts and provide such information on demand to the PUCO and the Ohio Consumer's Counsel, while marketers do not, R.C. §§ 4905.05, 4905.06, 4905.15, 4905.16, 4905.30, 4905.37, 4911.16; (5) utilities must treat similar customers equally, while marketers may negotiate the best deal they can obtain with each customer, R.C. §§ 4905.33, 4905.35; (6) utilities must receive approval from the PUCO before issuing securities, bonds, dividends, or even entering into a contract, while marketers need no such approval, R.C. §§ 4905.31, 4905.40, 4905.41, 4905.46(A), 4905.48; (7) utilities must submit and obtain hearing-mandated approval of a long-term forecast to the PUCO detailing their future demand for and

supply of gas, while marketers need not, R.C. § 4935.04; and (8) utilities must submit an annual report to the PUCO concerning their operations and finances, while marketers need not, R.C. § 4905.14.

All things considered, the cumulative regulatory and tax burdens placed on public utilities far outweigh those placed on marketers. There simply is no undue burden on interstate commerce in this instance.[4]

B. Congress Has Explicitly Permitted Ohio to Treat Natural Gas Utilities As A Separate Regulatory Classification.

Even if there were impermissible discrimination in this instance (which there is not), General Motors' Commerce Clause claim still would have to be rejected. Congress has been far from dormant in this area, and has authorized the States to draw the very classification at issue in this case. Since 1938, when the federal government first began regulating natural gas, Congress has expressly granted the States authority to regulate intrastate distribution of this commodity. Because Ohio has simply adhered to that federal classification in regulating sales by utilities differently from sales by other distributors, the dormant Commerce Clause

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[4] Whether one views this as a facial discrimination challenge or an undue burden challenge, any finding of discrimination "is demonstrably justified by a valid factor unrelated to economic protectionism." *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988). *See West Lynn Creamery, Inc. v. Healy*, 114 S. Ct. 2205, 2211 (1994). Because Ohio's health, safety and economic interest in regulating utilities separately from other businesses predated even the potential for discrimination in this instance, there can be little doubt that the State's interest is "unrelated to economic protectionism."

does not restrict its actions in this instance. *See, e.g*, *Northeast Bancorp, Inc. v. Board of Governors*, 472 U.S. 159 (1985); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 423 (1946).[5]

The dormant Commerce Clause does not independently restrict State action when Congress authorizes the States to regulate an area of interstate commerce. In that situation, there is no danger that the concern underlying the dormant Commerce Clause -- State "usurpation" of the power to regulate interstate commerce "conferred by the Constitution upon the Congress of the United States," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) (internal citation omitted) -- will present itself. Accordingly, "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." *Northeast Bancorp*, 472 U.S. at 174.

In this instance, Congress has firmly placed its stamp of approval on the regulatory classification that Ohio has drawn. Congress has explicitly granted the States exclusive jurisdiction to regulate entities that receive gas in interstate commerce at the borders of the State and that sell to ultimate consumers within the State. 15 U.S.C. § 717(c). In full, section 717(c) provides:

The provisions of this chapter shall not apply to any

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[5] Of course, this does not mean that Ohio is immune from attack on other constitutional grounds, such as equal protection. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (even though plaintiff could not claim Alabama discriminated against interstate commerce through its insurance regulations in light of the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011, *et seq.*, it was fully entitled to bring an equal protection challenge to those regulations).

> person engaged in or legally authorized to engage in the transportation in *interstate commerce* or the sale in interstate commerce for resale, of natural gas received by such person from another person *within or at the boundary* of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, *provided that the rates and service of such person and facilities be subject to regulation by a State commission.* The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Id. (emphasis added).

The circumstances leading to the passage of the statute confirm its applicability here. Enacted in 1953, the law represented a direct response to the Court's decision in *Federal Power Comm'n v. East Ohio Gas*, 338 U.S. 464 (1950). There the Court for the first time allowed the federal commission to regulate intrastate distribution of natural gas by local public utilities. *Id.* at 472; *see also* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2101, 2102 (*East Ohio Gas* allowed the federal commission to regulate public utilities "engaged in the distribution of natural gas whose operations take place wholly within a single State and which can be completely regulated by the respective States"). As

a direct result of *East Ohio Gas*, Congress "eliminated [federal and State regulatory] duplication by leaving the jurisdiction over these companies *exclusively in the states, as always has been intended.*" *See* H.R. Rep. No. 899, S. Rep. No. 817, 83d Cong., 2d Sess. (1953), *reprinted in* 1954 U.S.C.C.A.N. 2102 (1954) (emphasis added); *id.* ("The purpose of this legislation is to clarify the Natural Gas Act by further defining the limits of the Federal Power Commission's jurisdiction with respect to operations of companies engaged in the local distribution within a State of out-of-State natural gas which has been received by such a company at or within the State borders.").

In addition to the plain language of the statute and the revealing circumstances leading to its adoption, this Court's cases recognize the bright jurisdictional line drawn by this provision between the State's authority to regulate intrastate distribution through their public utilities on the one hand and the FERC's ability to regulate interstate transportation on the other. *See, e.g., Arkansas Electric Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 392-93 (1983); *Federal Power Comm'n v. Southern Cal. Edison Co.*, 376 U.S. 205, 211-17 (1964); *Panhandle Eastern Pipeline Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 337 (1951).

Ohio's regulation of natural gas public utilities falls well within these parameters. All natural gas received by Ohio public utilities is delivered to consumers within the State. *See* R.C. § 4905.03. And the Ohio Public Utility Commission is statutorily authorized to regulate the acquisition of natural gas, the rates charged for natural gas and the delivery of natural gas by these utilities. *See* R.C. §§ 4905.02, 4905.03.

Nor can General Motors escape the consequences of this congressional action by arguing that it has challenged a State

tax rather than a State regulation. The Court has recognized that the power to tax is "one of the forms of regulation," *Pacific Tel. and Telegraph Co. v. Tax Comm'n*, 297 U.S. 403, 413 (1936), and thus has consistently found that taxing authority is a subset of regulatory authority, *see North Dakota v. United States*, 495 U.S. 423, 434 (1990) (listing state tax laws as a form of regulation along with licensing provisions, contract laws and street regulations). Plainly, a grant of congressional authority to establish a separate regulatory classification for natural gas utilities encompasses the power to respect that classification by taxing such entities separately.

In the last analysis, Congress has given Ohio and the other States exclusive jurisdiction to regulate intrastate distribution of natural gas. All Ohio has done here is exercise that grant of authority and respect the very regulatory line that Congress has drawn: It separately classifies, regulates and taxes those participants in the natural gas market that engage in "transportation" of natural gas within "the boundary of a State." Other participants in the market, be they interstate pipelines, marketers, producers or anyone else, are treated differently because (as Congress itself has recognized) they are different. The dormant Commerce Clause simply does not prohibit such legitimate State action. Indeed, the rhetoric of the prohibition -- that it was designed to prohibit "economic Balkanization" and "local protectionism" -- makes little sense in the context of the intrastate distribution market, which Congress itself has Balkanized and which Congress itself has said may be entirely "protectionist." In short, whether interstate commerce discrimination occurs here or not, General Motors' dormant Commerce Clause challenge should be rejected.

II. OHIO'S REGULATION OF NATURAL GAS UTILITIES AND MARKETERS DOES NOT DENY EQUAL PROTECTION.

Just as Ohio has not violated the Commerce Clause through its regulatory distinction between natural gas utilities and marketers, neither has it violated the Equal Protection Clause by establishing two very-different sets of regulations for two very-different sets of businesses. Much like the Commerce Clause, this provision limits discrimination only between two "similarly circumstanced" entities, and gives the States substantial discretion in drawing these classifications. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Judicial deference is at its height when a plaintiff attacks a tax classification on equal protection grounds. "[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). "Where the public interest is served one business may be left untaxed and another taxed, in order to promote the one or to restrict or suppress the other." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 512 (1937) (internal citations omitted). For these reasons,

> it has repeatedly been held and appears to be entirely settled that a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others, from its taxes is not arbitrary and does not violate the Equal Protection Clause of the Fourteenth Amendment. Similarly, it has long been settled that a classification, though discriminatory, is not arbitrary or violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain

it.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 528 (1959) (internal citations omitted).

Measured against this modest test, Ohio's regulatory distinction between natural gas marketers and natural gas public utilities clearly passes. In exercising its police power in this area, as previously shown, Ohio has placed certain public service obligations on utilities that it does not place on marketers in view of the unique public services that utilities perform. The heavy regulations applicable to one group but not to the other by themselves supply a rational basis for establishing a system of different tax benefits and burdens for each group and for each group's customers.

General Motors offers several responses to these arguments, all unpersuasive. It initially contends that the tax scheme is "irrational" because Ohio taxes "identical" property differently depending on whether the seller is a marketer or utility. G.M. Br. 30. Once there is a rational basis for regulating utilities and marketers differently, however, it follows that a State can respect that difference in its sales regulations -- whether the two businesses sell the same goods or not.

Next, General Motors alternatively argues that rational basis scrutiny is not appropriate here. "[H]eightened judicial scrutiny" under the Equal Protection Clause is required, the company claims, because the classification "implicates other constitutional rights" -- here, alleged rights under the dormant Commerce Clause. G.M. Br. 30. That is wrong. "Unless a classification trammels *fundamental* personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require

only that the classification be rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (emphasis added). *See Gregg Dyeing Co. v. Query*, 286 U.S. 472, 482 (1932). Contrary to General Motors' suggestion, the Court has never endorsed the sweeping proposition that the dormant Commerce Clause creates "fundamental" rights for purposes of equal protection review. Given the array of state laws that presumably "implicate" interstate commerce, moreover, it is difficult to fathom a stopping point for this proposed rule.

Nor do the cases cited by General Motors support this argument. Some of the cases explicitly applied rational basis scrutiny to equal protection claims, *see, e.g., Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 875 (1985), *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359-60 (1973); others did not involve the appropriate standard of review in an equal protection case, *see Dennis v. Higgins*, 498 U.S. 439 (1991) (addressing whether Commerce Clause claims could be brought under section 1983), *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954) (addressing Commerce Clause challenge); and still others simply illustrated a division within the Court about whether to apply strict scrutiny to equal protection claims implicating the right to travel, *see Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986), *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985), *Williams v. Vermont*, 472 U.S. 14 (1985). On this record, the Ohio Supreme Court correctly rejected General Motors' equal protection claim.

CONCLUSION

For the foregoing reasons, the judgment of the Ohio Supreme Court should be affirmed.

Respectfully submitted,

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